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No. 03-55

In The

Supreme Court of the United States

DONNA J. FARFALLA,

Petitioner,

vs.

MUTUAL OF OMAHA INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent states that it has no parent companies and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iii
STATUTES AND RULES INVOLVED	1
STATEMENT OF THE CASE	1
A. The Plan	1
B. Petitioner's Claim For Long Term Disability Benefits	2
C. Termination of Benefits and Petitioner's Administrative Appeals	4
D. Petitioner's Post-Appeal Correspondence and Submission of Evidence	5
E. The Litigation	6
REASONS FOR DENYING THE PETITION	8
I. Petitioner's Claim Presents Poor Facts On Which To Clarify The Different Approaches Among The Circuits In Conflict Of Interest Cases	9
II. Petitioner Cannot Prevail Even Under A *De Novo* Standard Of Review	13
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Genuine Parts Co., Inc., 128 F.3d 1267 (8th Cir. 1997) 13

Armstrong v. Aetna Life Ins. Co., 128 F.3d 1263 (8th Cir. 1997) 10

Atwood v. Newmont Gold Co., Inc., 45 F.3d 1317 (9th Cir. 1995) 12, 13

Brown v. Blue Cross & Blue Shield of Alabama, Inc., 898 F.2d 1556 (11th Cir. 1990) 15

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 9, 13, 14

Schatz v. Mutual of Omaha Ins. Co., 220 F.3d 944 (8th Cir. 2000) 10

Weinberger v. Reliance Standard Life Insurance Company, 54 Fed. Appx. 553 (3rd Cir. 2002) 11

Woo v. Deluxe Corp., 144 F.3d 1157 (8th Cir. 1996) ... 6, 10, 13

STATUTES

29 U.S.C. § 1001 1

29 U.S.C. § 1132(a)(1)(B) 1

OTHER AUTHORITIES

Note, *An Overview of the Inconsistency Among the Circuits Concerning the Conflict of Interest Analysis Applied in an ERISA Action with an Emphasis on the Eighth Circuit's Adoption of the Sliding Scale Analysis in Woo v. Deluxe Corporation*, 75 N.D. L. Rev. 815, 827-828 (1999) 9

TABLE OF AUTHORITIES – Continued

Page

Restatement (Second) of Trusts § 187, Comment d (1959)..... 9

STATUTES AND RULES INVOLVED

ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), provides in pertinent part as follows:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought –
>
> **(1)** by a participant or beneficiary –
>
> * * *
>
> **(B)** to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]
>
> * * *

STATEMENT OF THE CASE

Petitioner Donna J. Farfalla brought this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, seeking the continuation of the payment of disability benefits under a group long-term disability insurance policy. The policy was issued by respondent Mutual Of Omaha Insurance Company ("Mutual") to petitioner's former employer, Creighton University, to fund Creighton's Long-Term Disability Plan ("Plan"). (Joint Appendix 32 (hereinafter "Appx. ___").)

A. The Plan

Creighton University is the Plan Administrator of the Plan. Mutual is the fiduciary responsible for investigating and deciding claims under the Plan. The Plan gives Mutual the authority and discretion to construe the terms

of the Plan and to decide all questions of eligibility under the Plan. (Appx. 32, 72.)

The terms "disability" and "disabled" are defined under the Plan as follows:

> **Disability and disabled** means your inability to work because of an injury or sickness. During your first 24 months of disability, you are totally disabled only if:
>
> (a) you cannot perform most of the main functions of your job; and
>
> (b) you are not paid for performing any other job.
>
> **After 24 months you are totally disabled if you cannot work for pay at any job for which you are reasonably fitted by education, training or experience.** (Appx. 33, 64) (emphasis added).

B. Petitioner's Claim For Long Term Disability Benefits

In late December 1994, petitioner fractured her left wrist. Due to the fracture, she was unable to perform her job as a cardiac arrhythmia technician. She filed a claim for long term disability benefits under the Plan. Mutual accepted the claim and paid benefits to petitioner pursuant to the Plan for slightly over two years.

During the two year period, Mutual obtained petitioner's medical records and otherwise monitored her condition and progress, including her participation in vocational rehabilitation and job placement programs sponsored by Mutual. In October of 1995, an in-house

reviewing physician indicated that the records in the file "do not support [total disability] since at least 9-21-95 . . . based on job description." The reviewing physician further suggested that Mutual obtain a functional capacity assessment ("FCA") to determine petitioner's capabilities. (Appx. 128.)

Thereafter, Mutual arranged, through an outside vendor, for petitioner to undergo an FCA. The FCA report indicated that petitioner is "able to work at a medium physical capacity level for occasional lifting and carrying" and is "able to work at a heavy physical capacity level for pushing and pulling." (Appx. 132, 133.) The FCA report also was provided to petitioner's treating physician, Dr. Jeffrey Tiedeman. On January 25, 1996, Dr. Tiedeman indicated that, although petitioner may have difficulty performing her prior job as an arrhythmia monitor technician, he would release her to pursue other work within the FCA guidelines. (Appx. 141.)

In addition to the fracture of her left wrist, petitioner suffered from carpal tunnel syndrome associated with her right hand. On August 29, 1996, petitioner underwent a surgical procedure known as a carpal tunnel release. (Appx. 143.) *On September 26, 1996, Dr. Tiedeman indicated that petitioner would be able to return to work as of that date*. Dr. Tiedeman included the following restrictions in connection with his release to work: "May gradually increase use of right hand over next 2 weeks; ok to seek employment, should not do data entry more than 50% of time at present." (Appx. 144.)

Despite job placement assistance from Mutual, petitioner was unable to find employment in late 1996 and early 1997. The vocational rehabilitation specialist hired

by Mutual to assist petitioner in finding work indicated in a report that she had discussed petitioner's status with Dr. Tiedeman on several occasions, and that – following the carpal tunnel surgery on her right hand – Dr. Tiedeman had "released her to the position of Cardiac Monitor Technician or any other position that she desired in the medical community." (Appx. 145-151 (quoted passage at Appx. 146)).

C. Termination Of Benefits And Petitioner's Administrative Appeals

By letter dated December 31, 1996, Mutual notified petitioner that it had decided to terminate petitioner's long term disability benefits under the Plan as of January 30, 1997. The letter advised that Mutual had determined that Petitioner did not meet the Plan's definition of total disability after 24 months. (Appx. 33, 152-153.) No benefits were paid to petitioner under the Plan after January 30, 1997.

Petitioner appealed the termination of her benefits. Petitioner subsequently submitted two additional FCAs to Mutual for consideration during her appeal. Although the FCAs indicated that petitioner might have difficulty with certain tasks, the reports state petitioner was able to use her hands for certain functions. Neither FCA indicated that she was unable to work. Dr. Tiedeman reviewed the latter of the two FCAs and recommended "that the parameters outline[d] in the functional capacity assessment be used as a guide for appropriate work restrictions." Dr. Tiedeman did not, however, prohibit Petitioner from working. (Appx. 167.)

In late November 1997, after obtaining additional medical records relating to petitioner's conditions, Mutual submitted petitioner's claim for an outside medical peer review. The physician who performed the review concluded that petitioner was "able to perform some occupation as of January 1, 1997" and "can work presently." (Appx. 169.)[1] Mutual then upheld its previous decision that petitioner "is ineligible for disability benefits based on her work capability and the definition of disability."

D. Petitioner's Post-Appeal Correspondence And Submission Of Evidence

Over two years after Mutual's final decision denying petitioner's appeal, petitioner submitted to Mutual a copy of a March 24, 1999 decision by the Social Security Administration ("SSA") which awarded social security benefits to petitioner due to fibromyalgia and other problems. In response, Mutual explained that petitioner had appealed "the termination of benefits in 1997 as provided under ERISA, the claim was further reviewed, and the decision terminating benefits was upheld." (Appx. 174.) Mutual explained that its prior decision was based upon the change in the policy definition of disability after 24 months. Because petitioner had not satisfied the definition of disability at that time, benefits had been terminated.

[1] Although the reviewing physician noted that "there are a number of psychosocial factors that make this claimant have a significant mental/nervous aspect to her condition," he emphasized that he is "not suggesting that there is any medical evidence that she is unable to work on that basis . . . " Again, the reviewing physician concluded that petitioner "was able to perform some occupation as of January 1, 1997" and that she "can work presently."

Finally, Mutual noted that the SSA decision clearly states that the SSA awarded benefits for a disability *beginning June 5, 1998*, well after Mutual's decision to terminate benefits under the Plan as of January 30, 1997. (Appx. 174.)[2]

E. The Litigation

Following a bench trial, the district court issued a Memorandum and Order in which it held that Mutual's claims determination under the Plan was subject to the deferential abuse of discretion standard. The district court examined whether a less deferential "sliding-scale" standard of review should be applied pursuant to *Woo v. Deluxe Corp.*, 144 F.3d 1157 (8th Cir. 1996), but determined that while "Mutual's status as both insurer and administrator could be considered a conflict of interest," petitioner did not produce "evidence tending to show that the conflict, if any, caused a serious breach of the plan administrator's fiduciary duty." (Petition, Appendix B at 12a-13a.)[3]

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[2] Petitioner argues in her Petition that Mutual had a palpable conflict of interest because it had a "financial incentive to shift the cost of disability to taxpayers by placing them on social security disability benefits." (Petition at 10.) Petitioner then argues that the fact she "did not receive Social Security Disability benefits until after termination of her ERISA benefits is irrelevant given that the financial offset occurs when the recipient qualifies for Social Security Disability, not when she/he actually receives it." (*Id.*) This argument by petitioner is a red herring. Putting aside petitioner's erroneous assertion that Mutual has the ability to "place" anyone on social security benefits, any potential financial benefit to Mutual that might arise from a Social Security determination would occur only when Mutual is *paying* benefits to a claimant. No financial benefit would arise to Mutual when it denies or terminates benefits, as Mutual did in this case.

[3] Mutual disagrees with petitioner's characterization in her Statement of the Case of the trial testimony of Gary Suing, Mutual's

(Continued on following page)

The district court then applied the abuse of discretion standard of review to Mutual's claims determination, pursuant to which a court examines whether the claims administrator's denial of benefits was reasonable. In holding that Mutual's decision was reasonable, the district court determined that the only conclusion supported by the administrative record is that petitioner was not totally disabled under the terms of the Plan:

> The *only conclusion* that the administrative record supports is the conclusion that Farfalla was not totally disabled from 'working for pay at any job' for which she was qualified. There is *no evidence* in the record that would support a contrary conclusion. . . . Farfalla's own treating physician released her to return to work.

(*Id.* at 15a) (emphasis added).

The Eighth Circuit Court of Appeals unanimously affirmed the district court's judgment. The circuit court agreed with the district court's conclusion that an abuse of discretion standard is appropriate, finding that the "palpable conflict of interest" arising from Mutual's dual roles as claims administrator and insurer of the Plan did not affect Mutual's claims determination. (Petition, Appendix A at 3a.) Significantly, the circuit court concluded that

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Manager of Group Disability Claims. For example, petitioner asserts that Mr. Suing testified at trial "in his words" that "Mutual had a financial interest which was affected by whether or not to continue paying disability payments to [petitioner]." *See* Petition at 7. A review of the transcript of the trial reveals that Mr. Suing made no such statement. See Petition, Appendix C at 19a-20a.

"Mutual exhibited ample 'reflection and judgment' before denying Ms. Farfalla's claim." (*Id.* at 4a.) The court also found the evidence overwhelmingly supported Mutual's decision:

> Nothing in her records, her treating physician's opinion, or the FCAs ever indicated that she was unable to perform any job for which she was "reasonably fitted by education, training or experience."
>
> * * *
>
> [T]here is *no evidence anywhere in the record* that Ms. Farfalla's condition met the definition of total disability that applied when her initial benefits were terminated, and there is considerable evidence to the contrary.

(*Id.* at 5a, 6a) (emphasis added).

REASONS FOR DENYING THE PETITION

This case does not warrant the Court's review. Although the circuit courts have developed different tests to determine the amount of discretion to give to a claims administrator operating under a conflict of interest, this litigation presents a poor medium for considering different approaches to the standard of review because the facts of this case are so one-sided. The courts below examined the administrative record before Mutual at the time it made its claims decision and determined that (1) petitioner has not shown that Mutual's dual status as insurer and claims administrator had an affect on the claims decision, and (2) there is no evidence in the administrative record to support petitioner's claim of disability under the Plan after

twenty-four months. Under these facts, petitioner would not prevail under any of the tests utilized by the courts of appeals in conflict of interest cases. Even under the *de novo* standard of review, petitioner could not prevail in this lawsuit. Because resolution of petitioner's claim in this lawsuit does not depend on which standard of review is applied, this case does not warrant the Court's review.

I. Petitioner's Claim Presents Poor Facts On Which To Clarify The Different Approaches Among The Circuits In Conflict Of Interest Cases.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* at 115 (quoting Restatement (Second) of Trusts § 187, Comment d (1959)). The courts of appeals have taken different approaches in applying this language from *Firestone* to determine the standard of review in situations in which a claims administrator is also the insurer of the plan or otherwise operates under a financial conflict of interest. *See* Note, *An Overview of the Inconsistency Among the Circuits Concerning the Conflict of Interest Analysis Applied in an ERISA Action with an Emphasis on the Eighth Circuit's Adoption of the Sliding Scale Analysis in Woo v. Deluxe Corporation*, 75 N.D. L. Rev. 815, 827-828 (1999).

In this case, Petitioner argued to the courts below that the Eighth Circuit's less deferential "sliding scale" standard of review should have been applied to review Mutual's determination of her benefits. Under the test

formulated by the Eighth Circuit, in order for a less deferential standard to apply, a plaintiff must present "material, probative evidence demonstrating that (1) a palpable conflict of interest . . . existed, which (2) caused a serious breach of the plan administrator's fiduciary duty to her." *Schatz v. Mutual of Omaha Ins. Co.*, 220 F.3d 944, 947 (8th Cir. 2000) (quoting *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1160 (8th Cir. 1998)). "It is only after a claimant clears this initial 'two-part gateway requirement,' that [a court applies] the 'sliding scale approach' of determining just how much less deferential the nature of the plan administrator's conflict warrants [a court] being to the plan administrator's decision to deny benefits." *Schatz*, 220 F.3d at 947.[4]

The lower courts determined that petitioner produced no evidence tending to show that Mutual's dual status as insurer and claims administrator caused a serious breach of Mutual's fiduciary duty or otherwise affected Mutual's

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[4] In addition to urging the Eighth Circuit to apply the sliding scale analysis, Petitioner argued that "[*d*]*e novo* review of a Plan Administrator's decision is required in those cases which the Plan Administrator is also the insurer," citing *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263 (8th Cir. 1997). Petitioner asserts in her Petition that the *Armstrong* decision evidences a conflict within the Eighth Circuit. (Petition at 14.) The Eighth Circuit has explained, however, that the "kind of conflict and improper motive that provoked de novo review in *Armstrong*, where the claims reviewers themselves apparently received direct personal financial benefits for rejecting claims, is different in kind from the sort of background conflict created by the mere fact that the same company is both the plan administrator and the plan insurer." *Schatz*, 220 F.3d at 947 n. 5. In the instant case, Petitioner did not argue, and presented no evidence, that Mutual's claims reviewers received direct personal financial benefits for rejecting claims.

claims decision. Accordingly, a less deferential standard was not applied.

Despite the factual determinations made by the lower courts in this case, petitioner now argues that she would have fared better under one of the conflict of interest tests employed by one of the other circuits. An application of the facts of this case to the other tests cited by petitioner show that the ultimate result would be the same – Mutual's decision terminating benefits must be upheld. For example, petitioner quotes the following language from *Weinberger v. Reliance Standard Life Insurance Company*, 54 Fed. Appx. 553 (3rd Cir. 2002), to support her argument that Mutual's decision would have been entitled to a less deferential standard of review in the Third Circuit:

> Although the fact that the decision-maker was also the insurer of the plan may not in itself warrant application of the least deferential standard of review, [citation omitted], a "high degree of skepticism" is necessitated in the presence of other extrinsic evidence of bias, such as procedural irregularities or inconsistent treatment of factual information.

Id. at 556.[5] In citing the Third Circuit's test, petitioner ignores the requirement that "other extrinsic evidence of bias" is needed before the "high degree of skepticism" is

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[5] The *Weinberger* case was not selected for publication in the Federal Reporter and has been designated as "not precedential" pursuant to the Third Circuit's Internal Operating Procedure 5.3.

employed. In this case, the district and circuit courts have concluded that there is no extrinsic evidence of bias.[6]

Plaintiff also directs this Court to the "presumptively void" tests used by the Ninth and Eleventh Circuits. Once again, the application of those tests to the facts of this case show that the ultimate result would be the same for petitioner. In *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317 (9th Cir. 1995), the Ninth Circuit reviewed the competing tests and determined that it employs a "methodology similar to that of the Eleventh Circuit." *Id.* at 1322.

> The "less deferential" standard under which we review apparently conflicted fiduciaries has two steps. *First, we must determine whether the affected beneficiary has provided material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the beneficiary.* If not, we apply our traditional abuse of discretion review. On the other hand, if the beneficiary *has* made the required showing, the principles of trust law require us to act very skeptically in deferring to the discretion of an administrator who appears to have committed a breach of fiduciary duty.

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[6] In fact, the district court stated that petitioner "can point to no procedural irregularities that are so egregious that the court has a total lack of faith in the integrity of the decision-making process from which to infer that the plan administrator did not use proper judgment." (Petition, Appendix B at 13a) (internal quotation marks omitted).

Id. at 1323 (emphasis added). The first step of the Ninth Circuit's test is comparable to the two prong *Woo* test employed by the Eighth Circuit in the instant case. Since the courts below have determined that petitioner produced no evidence tending to show that Mutual's dual status as insurer and claims administrator caused a serious breach of Mutual's fiduciary duty or otherwise affected Mutual's claims decision, it is apparent that the outcome of petitioner's case would not change under the Ninth Circuit test.

Based upon the facts of this case, any differences in the courts of appeals' formulations of the standard of review would not result in a different outcome for petitioner. Accordingly, review of this case by this Court is unnecessary.[7]

II. Petitioner Cannot Prevail Even Under A *De Novo* Standard Of Review.

In *Firestone*, this Court held that a denial of benefits under ERISA is reviewed *de novo* "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to

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[7] Mutual also notes that the final Pretrial Order entered in this case, and signed by Petitioner's attorney, clearly states that the issue to be decided by the trial court was "[w]hether Mutual of Omaha's decision to terminate Plaintiff's monthly long term disability benefits was arbitrary and capricious." *See* Order on Final Pretrial Conference ¶ (C) 1 (Appx. 33). It is well-established in the Eighth Circuit that the Pretrial Order governs the subsequent course of action in a lawsuit. *Anderson v. Genuine Parts Co., Inc.*, 128 F.3d 1267, 1271 (8th Cir. 1997). If the *Anderson* decision is followed, then petitioner has waived her right to argue for a less deferential standard of review.

construe the terms of the plan." 489 U.S. at 115. In addition, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a facto[r] in determining whether there is an abuse of discretion." *Id.* (internal quotation marks omitted). In the case at issue, it is undisputed that the Plan gives Mutual discretionary authority to determine eligibility for benefits, and the courts below considered Mutual's dual status in determining that Mutual did not abuse its discretion.

Even if petitioner could convince this Court that Mutual's claims decision should be reviewed under the *de novo* standard, the result of this case would not change. The district court determined that "[t]he only conclusion that the administrative record supports is the conclusion that [petitioner] was not totally disabled from 'work[ing] for pay at any job' for which she was qualified." (Petition, Appendix B at Appx. 188.) Likewise, the circuit court stated that "there is no evidence anywhere in the record that [petitioner's] condition met the definition of total disability that applied when her initial benefits were terminated, and there is considerable evidence to the contrary." (Opinion of the Eighth Circuit Court of Appeals, Petition, Appendix A at 6a.)

Since the courts below determined that there was only one conclusion to be drawn from the administrative record, it follows that *de novo* review would not have altered the outcome of this case. As the Eleventh Circuit has recognized, it "is fundamental that the fiduciary's interpretation must be 'wrong' from the perspective of de novo review before a reviewing court is concerned with the self-interest

of the fiduciary." *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1566 n. 12 (11th Cir. 1990) (applying the "presumptively void" test).

Because the courts below determined that Mutual reached the only conclusion possible, this Court need not accept this case to review the question presented by petitioner. Consideration of that question simply would not change the outcome of petitioner's lawsuit.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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